

REMARKS

Reconsideration of the rejections set forth in the Office Action dated August 20, 1999 and entry of the present amendment is respectfully requested. Applicant respectfully submits that the amendment places the application in a condition for allowance or in better form for consideration.

In response to the Office Action, claims 16, 18, 20, 23, and 24 have been amended in order to more particularly and distinctly set forth the patentable subject matter of the present invention.

A. Response to the Examiner's Rejection of claims 16-24 under § 112

The Examiner rejected claims 16-24 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention.

Specifically, the Examiner rejected claim 16 as being confusing, vague and indefinite in that the weight percent is not specified as being wet or dry weight. Applicant does not acquiesce to the rejection, however, claim 16 has been amended to expressly recite "dry weight percent" for clarification.

The Examiner also rejected claims 18 and 20 as being confusing due to the allegedly incorrect usage of bacterial genera terms and the allegedly unclear meaning of "protein isolates," respectively. Without acquiescing to the rejection, Applicant has amended claims 18 and 20 as suggested by the Examiner for clarification. Specifically, Applicant has replaced phrases such as "Lactobacilli strains" with --*Lactobacillus*-- and "protein isolates" with --protein concentrates--.

Finally, Applicant has corrected the typographical error in claims 23 and 24. Both claims have been amended to now depend on claim 22.

Accordingly, Applicant respectfully submits that the Examiner's rejections under § 112, second paragraph, have been obviated.

B. Response to the Examiner's Rejection of Claims 16-24 under § 103(a)

The Examiner rejected claims 16-24 under 35 U.S.C. § 103(a) as being unpatentable over Lynn taken with Gelinas, and Spiller et al. and further taken with Prescott et al., Jolly, Friend and El-Megeed et al. Because none of the cited references, either alone or in combination, teaches or suggests the subject matter of the present claims, entry of this Amendment and favorable action on the merits of the claims are respectfully requested.

As a threshold issue, none of the Lynn, Gelinas, Spiller et al. or El-Megeed et al. references can be properly combined with references such as Jolly, Friend, or Prescott et al. to form a rejection of Applicant's present claims under 35 U.S.C. § 103. Each of these references is non-analogous art because the respective disclosures are not "reasonably pertinent to the particular problem with which the inventor was involved." See Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 1535, 218 U.S.P.Q. 871, 876 (Fed. Cir. 1983) quoting In re Wood, 599 F.2d 1032, 1036, 202 U.S.P.Q. 171, 174 (CCPA 1979).

In addition, Applicant respectfully submits that the Examiner's statement that "[d]uring dormancy in the dried preparation, the 'vitality' of the *Lactobacillus* is maintained without feeding" is incorrect. Bacteria do expire after a certain period of time even in dried form. See, e.g., page 4, line 7 to page 6 line 17 of the original application. This problem is precisely a prior art shortcoming the present invention is directed to overcome. Evidence that the dried, non-living yeast disclosed in the subject application may prolong the vitality of bacteria is provided in examples 1 and 2 of the original application.

not any
or any viable yeast
any viable yeast

Moreover, the Examiner seemed to have misinterpreted the effect of the yeast disclosed in the subject application. One of the main purposes of the dried, non-living yeast as disclosed in the subject application is to provide nutrients for the bacteria so that the composition would have a long shelf life before consumption. Whether it can be ascertained if the presence of non-living yeast would significantly affect the “vitality” of *Lactobacillus* after reconstitution in the gut of an animal is irrelevant to the subject application.

Finally, Applicant respectfully submits that the amount of *Lactobacillus acidophilus* (1 kg or 0.7% of total weight), Brewer’s debittered powder yeast (8 kg or 5.3% of total weight), and soy protein (138.5 kg or 92.3% of total weight) presented in Example 1 is well within the range of the concentration recited in claim 16. Thus correlation between the invention as claimed and the preparation presented in Example 1 is readily apparent. Example 2 provides the advantageous properties regarding storage stability of bacteria.

With respect to the content of the prior art references, as mentioned in the Response to the previous Office Action dated March 5, 1999, Lynn, Gelinas, Spiller et al. and El-Megeed et al. are each directed to breadmaking technology. Therefore, to the extent a concentration range is disclosed, the references disclose different quantities of the yeast ingredients than that which is recited in the present claims. Because the amount of yeast used in breadmaking has to be at a minimum in order to maximize the quality of the bread dough, the amounts of yeast disclosed in these references are at most only half of the amount of the yeast concentration recited in claim 16. None of the references teach the yeast concentrations of the claimed invention. For example, the Gelinas reference cautions that “[t]he optimum quantity of yeast to be incorporated into the medium has been found to be about 0.25%. A larger content could give the eventual baked goods (prepared with the flavorant) an aftertaste.” (Gelinas, col. 6, lines 29-32.) Similarly, the Lynn reference

recites a yeast concentration range of 0.5-1.5 wt. %, and an optimal concentration of 1.0 wt. %.

(Lynn, col. 12, lines 32 and 43.) In contrast, claim 16 expressly recites a nutritional or dietary composition comprising approximately 2.5 to 20 dry weight percent dried, non-living yeast.

In addition, some or all of the above-discussed references disclose live yeast cells. See, e.g., Spiller et al., col. 11, line 15 (Example 1) and Example 2. Live yeast is necessary for breadmaking because of its fermentation capability. The present claims, on the other hand, expressly recite non-living yeast. Therefore, the Examiner's remark that during bread making the yeast cells multiply and that there would be a greater number of cells in the rising bread dough than in the original preparation still does not teach or suggest the subject matter of the present claims because the yeast cells referred to in these references are live cells that, at some point in the cited references, are maintained in an aqueous environment, hence their purported ability to multiply. In contrast, the claimed yeast are dried non-living yeast. Thus, to form a prima facie case under § 103 against the claimed invention on the combination of the cited references would require that the literal teachings of the references be discarded so that the concentrations of yeast may be altered, in some cases more than doubled, in direct contradiction to the teachings of the reference.

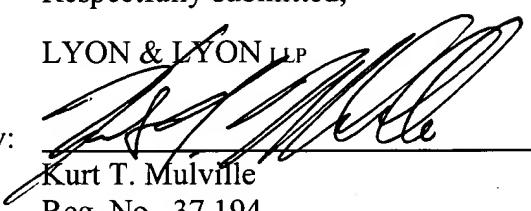
In short, none of the above-discussed references, either alone or in combination, discloses, teaches, or suggests a composition comprising a 2.5 to 20 dry weight percent dried, non-living yeast.

In view of the foregoing, it is respectfully submitted that the claims now presented in this application define patentable subject matter over the prior art cited in the Office Action. Accordingly, entry of the Amendment and allowance of the application are requested.

Respectfully submitted,

LYON & LYON LLP

By:


Kurt T. Mulville
Reg. No. 37,194

Dated: November 22, 1999

KTM/lf
633 West Fifth Street, Suite 4700
Los Angeles, California 90071-2066
(949) 567-2300, Ext. 1124
(213) 955-0440 Facsimile